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IN THE

Supreme Court of the United States

October Term, 1958

No. 478

FAREED N. KIAMIE, KIAMIE MANUFACTURING CO., INC., and KIAMIE FABRICS CO., INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This reply to respondent's brief filed November 26, 1958 is respectfully submitted pursuant to Rule 24(4) of this Court.

1. *Exhibit MQ as an Admission* (Resp. 13-15).[1] Respondent's position is that an admission may not be received in evidence as any proof of its contents unless supported by independent evidence (Resp. 2, 9, 13-14). This contention is contrary to basic principles of evidence and conflicts with the holding of this Court in *Insurance Company v. Newton*, 89 U. S. 32, and decisions of other circuits (Pet. 10-11).

Respondent seeks to avoid or dull the impact of this issue by beclouding the nature of Exhibit 229. On page

[1] "Resp." refers to respondent's brief; "Pet." refers to the petition herein.

13 respondent states that 229 "was received in evidence on Gellin's testimony"; on page 14 that MQ was received in evidence "on the theory that it was a part of the admission embodied in Exhibit 229, since the two groups of documents were submitted at the same time, stapled together"; and, again, that MQ "constituted an exculpatory portion of the admission".

No amount of verbal camouflage can hide the fact, recognized by both lower courts, that 229 was admitted in evidence as—and given the full force of—an admission. The trial court instructed the jury that the Government "used this paper [229] as an admission by the defendant that that money had been received and offered that to you as evidence that it really had been received, for you to consider" (R 982a). The Court of Appeals states with respect to 229 that "the trial court came to consider it as an admission of the defendants and the jury was permitted to give it that effect" (A 15).

It is equally clear, as respondent states (Resp. 14), that MQ was received as "a part" of the admission embodied in 229 (A 16), but the jury were instructed not to consider MQ as any proof of its contents (Pet. 9-10).

A document admitted in evidence as an admission is not subject to challenge as hearsay (Pet. 10-11). The records which "support" an admission do not affect its admissibility but bear solely on its weight and that is for the jury alone to determine. It is fundamental with respect to admissions that "once admitted into evidence they may be used as substantive proof for either party." *Link* v. *Eastern Aircraft*, 57 A. 2d 8, 9 (N. J. 1948).

Respondent contends that the excluded matter in *Newton* was "an integral, inseparable part of the matter admitted into evidence and was proved by the same documents and with equal trustworthiness" (Resp. 15). As indicated, the "trustworthiness" is a matter of weight, entirely for the jury. As to the inseparability of the documents, respondent

concedes that MQ was "a part of" 229, as the courts below recognized (R 981a-83a; A 16). Government witness Gellin, on whose testimony respondent now bases the reception of 229 in evidence, testified that "all the papers were put together as one report, the first part of the schedule [229], where all the sales were itemized, and this part of the report [MQ], right in back, and it was packed as one report" (R 490a). Indeed, MQ is incorporated by reference into 229 by the express statement in the latter that the "proceeds" of the sales listed therein "were used in payment for merchandise purchased" (Exhibit Volume, Exh. 229, p. 308).

In the *Perrin* case (Resp. 15; Pet. 11) the Court of Appeals for the Ninth Circuit followed the *Newton* principle, quoting this Court's opinion and other authorities, including the following excerpt from Best's Law of Evidence (169 Fed. at 26):

> "Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any self-serving statements it contains."

The court also quoted extensively from a decision by the Supreme Court of Maine, as follows (*id.* at 26-7):

> "* * * This court in *Storer* v. *Gowen*, 18 Me. 176, have held that: 'It is a principle well settled that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as against him. Both are equal evidence to the jury, who will give every part of the testimony such credence as it may appear to deserve. * * * And the [Massachusetts] court says in *O'Brien* v. *Cheney*, 5 Cush. 148: 'The general principle for which the defendant contends, namely, that, when the admission of a part is offered in evidence, he is entitled to have the whole of what he said on the subject, at that interview, stated as a part of the evidence, is correct and is not denied. * * *
>
> * * * in Moore v. Wright, 90 Ill. 473, the court holds that: 'where a party's admissions are called

> for, the party calling for the same is bound to take all the other party said upon the occasion concerning the matter in dispute, whether it makes for or against him.' It is unnecessary to make further citations. The above, we think, is a fair statement of the practice both in this country and England with respect to the admissibility of admission [sic] as testimony."

The asserted conflict is real. The ruling below crucially affected the petitioners' defense, of which MQ was a vital element.[2] The prosecutor used 229 as the crux of his case and as an admission in order to gain advantage of the strong probative force which naturally attaches to an admission. Having taken such advantage he should have been required to accept the disadvantage of MQ which was an integral part of the entire admission. Obviously, the Government would never have been given 229 without the explanation incorporated in MQ.

MQ was not even given the effect described by respondent (p. 14), but was discredited by the trial court's charge that the document "cannot be treated as proof" but only as showing that the petitioners "made this claim" (Pet. 9). The result was effectively to deprive MQ not merely of "full probative force" (Resp. 14) but of *any* probative force and unduly to magnify the weight of 229.

2. *The Prosecutor's Summation* (Resp. 15-17). The compelling and prejudicial identification of the jury's duty with the prosecutor's was in no sense invited by the defendant's summation, as in *Lawn* v. *United States*, 355 U. S. 339, 359, and went far beyond the mere statement of personal belief in *Henderson* v. *United States*, 218 F. 2d

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[2] As the Court of Appeals stated (A 4): "If no further claims had been made, this would have been a relatively simple case. The Government would have attempted to prove wilful concealment of unrecorded sales and appellants would have attempted to prove that the unrecorded sales were matched by a similar amount of unrecorded black market purchases."

14, 19 (6th Cir. 1955). The perfunctory generality toward the end of the trial court's charge to the effect that "counsels' opinions" should be disregarded (R 1845a) was no more effectual than the admonition in *Berger* v. *United States*, 295 U. S. 78, 85. There the Court, noting that the judge instructed the jury to "disregard" the prosecutor's statements, concluded (*ibid.*):

> "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

3. *The Fatal Variance* (Resp. 17-19). The indictment charged wilful understatement of corporate income by failure to report specific sales.

On pages 17-18 respondent states: "The Government's case was tried on the theory set forth in the bills of particulars (Pet. 4), and this theory accepted the cost of goods sold and the method of computing gross profit shown in the petitioners' returns." Respondent continues that "One of the elements of the crime thus proved was an additional tax due and owing as a result of petitioners' failure to report the unrecorded sales." This in fact was the entire crime charged, not merely one of the elements, but it was not the crime tried. The trial court refused to permit petitioners to introduce evidence that the intercorporate sales did in fact represent the unrecorded sales, unless they went further and proved (1) that a gross profit percentage had been applied to the reported sales in computing the tax and (2) that the gross profit percentage which was applied was a proper one. When the Government questioned the propriety of the gross profit percentage which was applied, it attacked "the cost of goods sold" as stated in the returns and as admitted in the bills of particulars (Pet. 7, 18).

At the trial it was shown by Government witness Gellin, the corporate accountant, that the "fictitious intercorporate sales" were reflected on the books of the corporation,

intentionally entered to reflect the unrecorded sales[3], taken by accountant Gellin as actual sales, and included in the returns (R 519a, 529a, 548a, 1518a). It was further shown by witness Gellin that the taxes were computed on the basis of the sales shown on the books (R 548a).

Respondent states "it was too obvious that the intercorporate sales did not in fact represent the unrecorded sales" (p. 18). In fact, the trial court charged the jury that the evidence that the intercorporate sales reported in the corporate returns were fictitious was "overwhelming" and, further, that to determine whether gross profit had been understated the jury should deduct such intercorporate sales from reported gross sales and then add the unrecorded sales (Pet. 6). Had that been the only issue submitted to the jury they could not have found that the income of the corporate defendants had been understated, since the fictitious intercorporates in fact reported in the returns fully offset the unrecorded sales (Pet. 6; G 229, Cts. Exh. 4).

In holding there had not been a shifting of theory or of burden of proof, the Court of Appeals approved the trial court's ruling "that the validity of the intercorporate sales defense depended upon proof that the corporations utilized an honest gross profit percentage figure in reporting their income" (A 6). The court based this conclusion squarely on the following erroneous premise:

> "For every intercorporate sale, however, there would be of course a corresponding intercorporate purchase. Under orthodox accounting techniques intercorporate transactions could not result in additional overall income being reported, since the amount added to gross sales of one corporation would be offset by an identical amount added to the cost of goods sold of another corporation." (A 6)

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[3] The inclusion was not "erroneous", as respondent contends (Resp. 11).

This completely overlooks the indisputable fact that only Kiamie Mfg. and Kiamie Fabrics were indicted. The other three Kiamie corporations—Princess Helena Mfg. Co. Inc. (Helena), Rosamonde Lingerie Mfg. Co. Inc. (Rosamonde), and Kiamie International Ltd. Inc. (International)—were not indicted. Moreover, as the Court of Appeals quite properly held, "each of the corporations was a separate tax entity" (A 9).

An intercorporate sale by Kiamie Mfg. obviously could not result in a corresponding intercorporate purchase by that corporation. Nor would an intercorporate sale by Kiamie Mfg. result in a corresponding intercorporate purchase by Kiamie Fabrics, unless the transaction (admittedly fictitious) were entered in the books as having taken place between those two corporations. On the other hand, intercorporate sales recorded as having been made by Kiamie Mfg. or Kiamie Fabrics to the non-defendants Helena, Rosamonde or International would result in additional income being reported by Kiamie Mfg. or Kiamie Fabrics which would not be offset by the corresponding amounts added to the cost of goods sold of the non-defendants Helena, Rosamonde or International. It is wholly immaterial that in such case the non-defendant corporations would increase the cost of goods sold reported in their returns, since each such corporation is "a separate tax entity", its income taxes are not involved in the instant indictments and it is not charged with any income tax evasion.

Therefore, in holding with respect to the two petitioner-corporations that each intercorporate sale would be offset by the corresponding intercorporate purchase, the lower courts necessarily disregarded the "separate" tax entities of all five Kiamie corporations. This single error caused the trial court not only to change the charge in the indictment but to shift to the defendants the burden of proving material which the prosecution would have had to prove if such material had in fact been an element of the charge.

The shift in burden of proof makes the variance here involved far more insidious than that which existed in the decisions of other Circuits which conflict with the holding below (Pet. 17, 19).

New York, N. Y.,
December 3, 1958.

Respectfully submitted,

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